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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARY L. TUTTLE
Plaintiff,
vs.
CHASE INSURANCE LIFE AND
ANNUITY COMPANY, FEDERAL
KEMPER LIFE ASSURANCE CO,
SELECTQUOTE INSURANCE
SERVICES, and DOES 1-10 .
Defendants.

CASE NO.: C 07-3637 MEJ

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FOURTH,
FIFTH & SIXTH CAUSES OF ACTION**

Date: August 30, 2007

Time: 10:00 a.m.

Place: Courtroom B, 15th Floor

Honorable Maria-Elena James

Plaintiff, MARY L. TUTTLE (Mary) does not oppose defendant Protective Life Insurance Company's (Protective) Motion To Dismiss the Fourth Cause of Action for fraud because she has been unable to locate advertisements that her husband had relied on when he purchased the insurance at issue in this case. Neither does Mary oppose the Motion To Dismiss the Sixth Cause of Action based on unfair business practices as California no longer allows such actions. Mary, however, opposes the Motion To Dismiss the Fifth Cause of Action for emotional distress because the relationship between an insurer and its insureds supports such a cause of action and the shabby way she has been treated states a viable claim against Protective.

Mary bases her opposition on the following Memorandum of Points and Authorities, on the papers, pleadings and other documents on file in this action and on oral argument to be presented at the hearing on the motion.

MEMORANDUM OF POINTS & AUTHORITIES

Protective is the successor-in-interest to Chase Insurance Life and Annuity Company (Chase) and, as such, is liable for the torts of Chase. (Protective does not deny such successor liability - it is not an issue.) On April 16, 2004, Chase issued a life insurance policy to Mary's husband, Jim Tuttle. Jim paid Chase the premium it ask for and, in consideration for those payments, Chase promised Jim it would pay his widow, Mary, One Hundred Thousand Dollars (\$100,000.00) when he died. Jim died on October 12, 2005 and, when Mary asked for her money, rather than paying her as it had promised Jim it would, it told Mary that her deceased husband, Jim, had lied in his application for the insurance and kept her money.

The Fifth Cause of Action, Protective's Motion To Dismiss and Mary's Opposition

The Fifth Cause of Action. In the Fifth Cause of Action, Mary alleges that a special relationship exists between an insured and its insurer. (Complaint 6:23.) Mary further alleges that she and her husband "reposed trust and confidence in the fidelity of the defendants and relied on the good faith and integrity of defendants that they would perform the promises they made in the policy". (Complaint 6:23-25) In paragraphs 33 and 34, the complaint further alleges that Chase, and now Protective, betrayed the Tuttle's trust and confidence in their fidelity and integrity by unjustifiably refusing to pay policy benefits without reasonable grounds and that Chase, and now Protective, knew such betrayal would subject Mary to emotional distress. (Complaint 7:3-9.)

Protective's Motion To Dismiss. Protective argues that the Fifth Cause of Action is not a cause of action for emotional distress but rather a claim for breach of fiduciary duty and, because there is no *truly* fiduciary relationship between an insurer and its insureds, the court must dismiss it.

1 (Motion 8:3-12.) That is not the case.

2 Mary's Opposition. The Fifth Cause of Action does not allege that a "fiduciary" relationship
3 exists between an insurer and its insureds. It alleges that a "special" relationship exists. It goes on to
4 allege that, in light of that special relationship, the manner in which defendants denied Mary the
5 benefits they promised Jim they would pay her was especially egregious - outrageous - and thereby
6 states a classic cause of action for emotional distress. The special relationship between insurer and
7 insured, when coupled with defendants' betrayal of Mary and Jim's trust in their integrity, states a
8 cause of action for emotional distress.

9

10 **Argument.**

11 The Special Relationship between an Insurer and Its Insureds. A "special" relationship exists
12 between an insurer and its insureds. The California Supreme Court described that special relationship
13 in *Foley v. Inrteractive Data Corp.* (1988) 47 Cal.3d 654 at 684-685

14 The insurance company's obligations to their insureds are rooted in their status of
15 purveyors of a vital service labeled quasi-public in nature. Suppliers of services
16 affected with a public interest must take the public's interest seriously, where necessary
17 placing it before their interest in maximizing gains and limiting disbursements. . . .
18 [A]s a supplier of a public service rather than a manufactured product, the obligations
19 of insurers go beyond meeting reasonable expectations of coverage. The obligations of
20 good faith and fair dealing encompass qualities of decency and humanity inherent in
21 the responsibilities of a fiduciary¹.

22 Just two years earlier, in *Frommoethelydo v. Fire Ins. Exchange* (1986) 42 Cal.3d 208 at p. 215, the
23 California Supreme Court flat-out stated

24 In addition [to the duty of good faith and fair dealing] an insurer holds itself out
25 as a fiduciary. With the public trust must go private responsibility consonant with the
26 trust, including qualities of decency and humanity inherent in the responsibilities of a
27 fiduciary.

28 ¹In *Foley*, the Supreme Court refused to extend tort remedies and tort damages for breach of the covenant of good
29 faith the law implies in every contract from insurance contracts to employment contracts because the employment
30 relationship does not come up to the high standards of the insurance relationship. Protective's assault on *Foley* is part of
31 the insurance industry's relentless efforts to neutralize the Court's characterization of the quasi fiduciary relationship
32 between an insurer and its insureds. Those efforts have had some success in some trial courts and some intermediate
33 courts of appeal but the Supreme Court has never filed a retraction.

1 And eleven years later, in *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, at p. 44,
 2 citing *Foley* with approval, the court stated

3 As our decisions acknowledge, tort recovery in this particular context is considered
 4 appropriate for a variety of policy reasons. Unlike most other contracts for goods or
 5 services, an insurance policy is characterized by elements of adhesion, public interest and
 6 fiduciary responsibility... . In general, insurance policies are not purchased for profit or
 7 advantage; rather, they are obtained for peace of mind and security in the event of an
 8 accident or other catastrophe.

9 That special relationship heightens the reciprocal duties between the parties and thus raises the
 10 standards of care breach of which gives rise to a cause of action for emotional distress damages. In an
 11 ordinary garden-variety situation, conduct that may not be egregious enough to give rise to a cause of
 12 action for emotional distress will, within the special relationship between an insurer and its insureds,
 13 be sufficiently egregious to support such an action.

14 To allege a cause of action for intentional infliction of emotional distress, Mary must allege
 15 outrageous conduct by Chase in reckless disregard of the likelihood that emotional distress would
 16 result. *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903. Furthermore, although there is no
 17 tort known as “negligent infliction of emotion distress”, Mary can recover such damages as the direct
 18 victim of negligent conduct because of the special relationship between Mary and the insurer
 19 defendants. *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1073.

20 The Allegations of the Fifth Cause of Action. The allegations of the Fifth Cause of Action are
 21 sufficient to satisfy the requirements of both intentional infliction of emotional distress and a direct
 22 victim’s action for negligence by one with a special relationship to the victim. The cause of action
 23 alleges that after Jim died, Mary went to Chase and asked for the benefits it had promised Jim it
 24 would pay Mary to help provide for her financial needs after his death. Rather than honoring its
 25 promise, Chase told Mary that they would pay her nothing² because her recently deceased, beloved,
 26 husband had lied, he was a fraud. That is a shameful, uncivilized, way to treat a widow. It’s

27 ²Chase offered to return the premiums Jim had paid but that was only because of a legal necessity. The point is
 Chase told Mary that she gets nothing from the policy because her husband was a liar.

1 outrageous. It is far more flagrant than the situation in *Fletcher v. Western National Life Ins. Co.*
2 (1970) 10 Cal.App.3d 376. The *Fletcher* Court found that an insurer acted outrageously when,
3 without a reasonable basis, it falsely accused a disabled insured whom the insurer knew was in
4 desperate financial straits of concealing a congenital ailment on his insurance application and tendered
5 a small amount to the insured in an attempt to coerce him into surrendering the policy. (See 10
6 Cal.App.3d 391-392.)

7
8 **Conclusion.**

9 The Fifth Cause of Action alleges facts sufficient to state a claim for emotional distress. Mary
10 therefore respectfully asks the court to deny Protective's motion to dismiss the Fifth Cause of Action.
11 The cause of action is not only important with regard to damages, it also has important significance
12 for evidence, jury instructions and argument at trial.

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14 DATED: August 8, 2007.

15
16 /s/ _____
17 James F. Kemp
18 Attorney for Plaintiff Mary L. Tuttle
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